IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JUNIES A. JENKINS, Plaintiff/Appellant, v. TABETHA SEDILLO, BARBARA ULIBERRY, and STATE OF ARIZONA DEPARTMENT OF CORRECTIONS, Defendants/Appellees.	2 CA-CV 2006-0229 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200600398

Honorable Kevin D. White, Judge

AFFIRMED

Junies A. Jenkins
Buckeye
In Propria Persona

Terry Goddard, Arizona Attorney General
By Linda L. Matson
Phoenix
Attorneys for Defendant/Appellee
State of Arizona Department of Corrections

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Junies Jenkins appeals from the trial court's decision declining jurisdiction of his special action complaint, in which he requested damages and attempted to have the court order two Arizona Department of Corrections (DOC) paralegals to assist him in filing a civil complaint. For the following reasons, we affirm.

¶2 In June 2005, Jenkins, a DOC inmate, filed a complaint in state court against his brother, sister-in-law, and niece, alleging the wrongful death of his mother and other torts. As part of his effort to represent himself in that matter, Jenkins also filed a standardized DOC "State Court Complaint," which he entitled a "Petition for Special Action" in handwriting underneath the standard printed caption. Therein, Jenkins maintained the paralegals were "conspiring to deny [him] access to the court," requested damages, asked the court to order his documents "returned for copying per D[epartment] O[rder] # 902,"[1] and one of the paralegals to pay all his filing fees and copying costs.

¶3 The trial court, treating the pleading as a special action complaint, ordered that receipt of the complaint by the attorney general's office "shall constitute service of process upon the named respondent(s)/defendant(s) and the Arizona Department of Corrections" and they "shall have forty (40) days after receipt of the copy of the [complaint] . . . to file a responsive pleading herein." The clerk of the court mailed the complaint to the attorney general's office, and an assistant attorney general signed a notice of receipt for the

[1]The DOC Department Order Index is available at http://www.azcorrections.gov/adc/policy/dept_orders.asp.

documents on July 19. Jenkins unsuccessfully moved to have a default judgment entered against DOC and the paralegals on August 22. DOC filed a response on the fortieth day after it had received Jenkins's complaint, August 28. The trial court declined special action jurisdiction in an unsigned minute entry order. Jenkins filed a notice of appeal from that order on December 11, 2006.[2] The court entered a signed judgment on January 3, 2007.

¶4 We review the superior court's decision to decline special action jurisdiction for an abuse of discretion. *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (App. 1979). We find no such abuse here. Special action jurisdiction is only appropriate to answer three questions.

> (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
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> (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
>
> (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Ariz. R. P. Spec. Actions 3, 17B A.R.S.

¶5 Although Jenkins did not specify the particular question he was raising in the special action, his claims that the paralegals would not assist him with his civil lawsuit and

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[2]Although Jenkins's notice of appeal was premature, we need not dismiss the appeal because the final, appealable judgment has been entered and no prejudice has resulted to the state. *See Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981).

his request for relief on that basis could potentially be cognizable as a claim that they had failed "to perform a duty required by law as to which [they] ha[ve] no discretion." Ariz. R. P. Spec. Actions 3(a). Jenkins appears to be arguing the paralegals and DOC had a duty to copy his materials and/or assist him in filing his tort case. Any such duty would arise from a prisoner's "constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 1494 (1977). But the United States Supreme Court has limited inmates' "constitutional right of access" to certain types of actions: those that "attack their sentences, directly or collaterally, and . . . challenge the conditions of their confinement," *Lewis v. Casey*, 518 U.S. 343, 355, 116 S. Ct. 2174, 2182 (1996), and those brought under 42 U.S.C. § 1983 to vindicate basic constitutional rights, *Wolff v. McDonnell*, 418 U.S. 539, 579, 94 S. Ct. 2963, 2986 (1974).

¶6 In response to this case law, DOC adopted Department Order (DO) No. 902 to "ensure[] that all inmates have direct access to the courts in all legal claims involving direct appeals from the conviction for which they are incarcerated, habeas petitions, civil rights actions, or conditions of confinement . . . by making forms and specific legal assistance available to the inmate population." The order designates the "legal claims" described above as "qualified legal claims." DO 902, at 19 (defining "qualified legal claims" as "[i]n the direct appeal, any claim of error; in the Post Conviction Relief proceeding, any non-precluded claim set forth in Ariz. R. Crim. P. 32[;] and in federal court, any claim of error based on a violation of the federal constitution or law"). DO 902 sets forth detailed

procedures involving both qualified and nonqualified legal claims. *See, e.g.*, DO 902.01. Under those procedures, "[i]nmates may receive active assistance in the initial filing of pleadings involving qualified legal claims from contract Paralegals provided by the Department." DO 902.04. But paralegals may "not actively assist inmates in the filing of documents" for nonqualified legal claims, DO 902.01.1.2, nor "[a]id inmates in any matter, legal, quasi-legal or non-legal, that does not involve qualified legal claims." DO 902.03.1.2.2.2.

¶7 DOC will copy legal claim documents if, after review by a paralegal, the claims are determined to be qualified legal claims. DO 902.05.1.1. Copying of qualified legal claim documents is provided "regardless of the inmate's ability to pay," but the cost of the service becomes a debt on the inmate's account. DO 902.06.1.1. On the other hand, DOC is not required to copy nonqualified legal documents, nor does it provide the service despite an inmate's ability to pay. DO 902.07, 902.07.1.1.

¶8 Jenkins does not contend the tort case against his family is a qualified legal claim, nor does our reading of DO 902 compel that conclusion. Thus, the filing of that complaint is outside the scope of an inmate's constitutional right of access to the courts. *See Lewis*, 518 U.S. at 355, 116 S. Ct. at 2182; *Wolff*, 418 U.S. at 579, 94 S. Ct. at 2986. However, Jenkins has added the paralegals as named defendants in a new complaint in the tort case against his family, alleging they violated his constitutional rights. But, even were we to construe that complaint as a qualified legal claim, DO 902 mandates that constitutional

claims be filed in federal court. DO 902, at 19 (defining "qualified legal claim"). Nor has Jenkins alleged that his inability to file a civil rights action in state court fails to give him meaningful access to the courts. Finally, we can find no requirement in any of the relevant authorities that an inmate have a right of access to state, rather than federal, court. Therefore, Jenkins's allegations that his civil rights were violated do not change his clearly nonqualified legal claims surrounding the death of his mother into qualified claims that entitle him to assistance from DOC. *See Lewis*, 518 U.S. at 355, 116 S. Ct. at 2182 (inmate's right of access to courts protects challenges to conviction and "[i]mpairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration"). Accordingly, the paralegals had no "duty required by law" for which special action relief would be warranted, Rule 3(a), Ariz. R. P. Spec. Actions, and the trial court did not abuse its discretion by declining to accept jurisdiction.

¶9 Jenkins belatedly argues that, because he is proceeding *pro se*, he did not intend to file a special action complaint, but rather, a civil complaint. However, he responded to the state's opposition, in which the state thoroughly discussed special action jurisdiction, with a motion for summary judgment, in which he did not raise the issue of his intent to file a civil complaint. After the court declined jurisdiction of his special action, Jenkins filed a motion for reconsideration in which he raised the issue for the first time. This court generally does not consider issues raised for the first time before the trial court in motions for reconsideration. *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 491 Ariz. Adv. Rep. 17,

¶ 15 (Ct. App. Nov. 13, 2006). And, because the trial court's declining special action jurisdiction does not preclude Jenkins from filing a proper complaint, we need not address the issue further.

¶10 To the extent Jenkins argues the trial court erred when it failed to enter a judgment by default against DOC and the paralegals, we find no error. DOC filed its opposition to the complaint on August 28, 2006, exactly forty days after it received Jenkins's complaint and within the deadline set by the court.

¶11 Jenkins also implicitly argues the regulation at issue, DO 902, is unconstitutional, relying on *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987). The Supreme Court held in *Turner* that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89, 107 S. Ct. at 2261. But Jenkins has not met the threshold requirement of demonstrating that the regulation has impinged on his constitutional rights because, as discussed, an inmate has no constitutional right of access to courts for claims not relating in any way to his or her conviction. *See State v. Herrera*, 121 Ariz. 12, 15-16, 588 P.2d 305, 308-09 (1978) (to have standing to raise constitutionality of statute, person must have suffered actual or threatened injury from it). Moreover, he did not raise this issue to the trial court. *See State v. Lefevre*, 193 Ariz. 385, ¶ 15, 972 P.2d 1021, 1025 (App. 1998) (appellate court generally does not address even constitutional questions not raised to trial court).

¶12 Similarly, Jenkins raises on appeal for the first time the argument that the paralegals violated the multiplicity rule when they conspired together. The multiplicity rule "prohibits the Government from charging a single offense in several counts and is intended to prevent multiple punishments for the same act." *United States v. Kimbrough*, 69 F.3d 723, 729 (5th Cir. 1995). We see no possible application of this rule to any actions the paralegals took.

¶13 Finally, Jenkins's opening brief contains a document entitled, "Petition for Special Action Ex Parte Injunctive Relief." To the extent he is attempting to bring a special action before this court, we decline jurisdiction because all the issues he raises can be adequately addressed in an appeal. *See State v. Slayton*, 214 Ariz. 511, ¶ 6, 154 P.3d 1057, 1059 (App. 2007).

¶14 Affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge